BAR MALAYSIA v. KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR
KAMALUDIN MD SAID J
[ORIGINATING SUMMONS NO: WA-24-12-03-2017]
2 APRIL 2018
[2018] CLJ JT(2)

LEGAL PROFESSION: *Professional privilege – Communication between solicitor and client – Privilege against disclosure – Evidence Act 1950, s. 126 – Whether subject to and caught by s. 142(5) of Income Tax Act 1967 – Demand for disclosure of communication by Director General of Inland Revenue – Whether illegal and unlawful – Whether in breach of Evidence Act 1950 and Legal Profession Act 1976*

REVENUE LAW: *Director General of Inland Revenue – Powers and functions – Power of access to buildings and documents – Evidential provisions – Income Tax Act 1967, ss. 80(1) & 142(5) – Effect and purport – Whether having overriding effect on other written law – Whether could prevail over s. 126 of Evidence Act 1950 – Documents forming part of solicitor-client communication – Whether privileged and protected from disclosure*

STATUTORY INTERPRETATION: *Construction of statutes – Conflicting statutes – Income Tax Act 1967 (ITA), s. 142(5) – Evidence Act 1950 (EA), s. 126 – Whether s. 142(5) overrides or is subject to s. 126 EA – Chapter IX Part III of EA – Whether unaffected by operation of ITA – Generalia specialibus non derogant – Non-obstante clause – Applicability*

The defendant, the Director General of Inland Revenue, acting purportedly pursuant to ss. 80 and 142(5) of the Income Tax Act 1967 ('ITA'), carried out raids on the law firms of members of the plaintiff with a view to auditing the firms, and in consequence, demanded from the solicitors concerned, records, documents and books relating to the latter's clients or client's accounts. Aggrieved, the plaintiff applied to the High Court for declarations that the exercise by the defendant was abusive, unlawful and illegal, that the defendant had breached the provisions of the Evidence Act 1950 ('EA') and the Legal Profession Act 1976 ('LPA'), that neither s. 80 nor s. 142(5) of the ITA entitled the defendant to disregard the privilege under the law that protects communications between an advocate and solicitor and his client, and that, under s. 126 and Chapter IX of Part III of the EA, an advocate and solicitor is mandated, unless waived, to reject any request for the disclosure of such communications. The defendant argued and reiterated that the raids did not breach the principle of solicitor-client privilege as the revenue officers were empowered to act the way they did by s. 80(1) of the ITA. It was further averred that the term 'save as provided in para (b)' in sub-s. 142(5)(a) of the ITA, and the *non-obstante* clause in sub-s. 142(5)(b),

connotes that the operation of s. 126 of the EA 1950, which was part of Chapter IX of Part III of the EA 1950, was ousted by the operation of sub-s. 142(5)(b), and in any case that, s. 142(5) of the ITA, upon the principle of *generalia specialibus non derogant*, overrides s. 126 and Chapter IX Part III of the EA, as well as the EA and the LPA.

Held (allowing application; granting prayers):

(1) Reading s. 126 of the EA and s. 142(5) of the ITA shows that the ITA does not affect the operation of Chapter IX of Part III of the EA, and that only sub-s. (b) of s. 142(5) of the ITA seeks to exclude or override privilege conferred in other written law. Subsection (b) of s. 142(5), by its words, however saves Chapter IX of Part III of the EA from the operation of the ITA. It follows that s. 126 of the EA, which lies within Chapter IX Part III of the EA, is not caught under s. 142(5) of the ITA, and, exempting what is stated in its proviso, shall prevail over s. 142(5) of the ITA. (paras 12, 13, 14 & 15)

(2) Bearing in mind the Explanatory Statement to s. 142(5) of the ITA, the section, at most, only has the effect of removing privilege in respect of any book, account, statement or other record prepared or kept by 'practitioners' such as tax accounts and tax agents with a view of taxing their clients, and it does not extend to 'advocates and solicitors'. This intention is also made clear by the fact that s. 142(5) uses two different terms, namely 'practitioner' and 'advocate and solicitor'. It is axiomatic that when different words are used in a statute, they refer to different things and this is particularly so where the different words are, as here, used repeatedly. It follows that s. 142(5) could not be used by the defendant as an excuse to gain access to the client's account with a view to taxing the advocates and solicitors. (paras 21, 22, 23, 24 & 26)

(3) The defendant had wholly misconstrued the applicability of the *non-obstante* clause in the present case. It is a general principle that a *non-obstante* clause cannot go outside the limits of the Act, is subject to the limitation contained in the section and cannot be read as excluding the whole Act or standing by itself. Thus, care has to be exercised in construing the *non-obstante* nature of s. 142(5) of the ITA, so as to give effect to the intention of Parliament, and so as not to go beyond the purpose and object for which the section is enacted. (paras 18, 19 & 20)

(3a) The phrase 'notwithstanding the provisions of any other written law' in s. 142(5) of the ITA, in any case, does not exclude the operation of common law. It is clear upon case law authorities that Parliament does not intend to apply s. 142(5) of the ITA to the exclusion of the common law principles on privilege. Section 142(5) could not be given effect to the extent beyond Parliament's intention. (paras 27 & 33)

(4) The defendant had misunderstood and misapplied the maxim *generalia specialibus non derogant.* Based on the clear and express language of s. 126, the EA is the specific statute which governs matters pertaining to privilege. And although s. 126 was enacted before s. 142(5) of the ITA, it is a specific provision on privilege and as such excludes the operation of the general provision of s. 142(5) of the ITA to the extent of any inconsistency. (para 34)

(5) The terminology 'in the course and for the purpose of (an advocate's) employment' is repeated numerous times throughout s. 126 of the EA. However, s. 142(5) of the ITA merely makes reference to the term 'in connection with any client', a terminology which is extremely general and far from specific. As such, the EA is undeniably more precise, unambiguous and specific. Section 126 of the EA therefore must take precedence over s. 142(5) of the ITA to the extent of any inconsistency in respect of matters pertaining to privilege. (paras 39 & 40)

Obiter:

(1) Bearing in mind the proviso to s. 126 EA, before the defendant could view the 'client's account', there must be some information of an illegal act or purpose or any crime of fraud or a reasonable belief that the solicitor has used the client's account as a means to park the law firm's own incomes, such as to result in an understatement of income, thereby warranting an investigation by the defendant. (paras 53 & 55)

Case(s) referred to:

AG Varadarajulu And Another v. State Of Tamil Nadu and others (1998) 4 SCC 231 ***(refd)***
All Malayan Estates Staff Union v. Rajasegaran & Ors [2006] 4 CLJ 195 FC ***(refd)***
Blunden v. Commonwealth of Australia [2003] HCA 73 ***(refd)***
British Railways Board v. Pickin [1974] AC 765 ***(refd)***
Choong Yik Son v. Majlis Peguam Malaysia [2008] 10 CLJ 101 HC ***(refd)***
Commissioner of Inland Revenue v. West-Walker [1954] NZLR 191 ***(refd)***
Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd (Bar Council Malaysia, Intervener) [2004] 1 CLJ 701 FC ***(refd)***
Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 3 CLJ 405 FC ***(refd)***
Director of Customs, Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation) [1995] 3 CLJ 316 SC ***(refd)***
DP Vijandran v. Majlis Peguam [1996] 1 CLJ 23 CA ***(refd)***
Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 CLJ 511; [1985] CLJ (Rep) 122 SC ***(refd)***
Funk David Paul v. Asia General Asset Bhd [2013] 1 LNS 1327 CA ***(refd)***
Gideon Tan v. Tey Por Yee & Another Appeal [2017] 1 CLJ 543 CA ***(refd)***
Gurbachan Singh v. PP [1967] 1 LNS 50 FC ***(refd)***
Ho Tack Sien & Ors v. Rotta Research Laboratorium S.p.A & Anor; Registrar Of Trade Marks (Intervener) & Another Appeal [2015] 4 CLJ 20 FC ***(refd)***
Kesultanan Pahang v. Sathask Realty Sdn Bhd [1998] 2 CLJ 559 FC ***(refd)***
Ketua Pengarah Hasil Dalam Negeri v. Malaysian Bar [2006] 5 CLJ 217 HC ***(refd)***
Koh Siew Keng & Anor v. Koh Heng Jin [2008] 3 CLJ 450 CA ***(refd)***
Lee Lee Cheng v. Seow Peng Kwang [1960] MLJ 1 ***(refd)***

Malaysian Newsprint Industries Sdn Bhd v. Bechtel International Inc & Anor [2014] 3 CLJ 367 HC ***(refd)***
Manilal & Sons (M) Sdn Bhd v. M Majumder [1988] 1 LNS 16 SC ***(refd)***
Manokaram Subramaniam v. Ranjid Kaur Nata Singh [2008] 6 CLJ 209 FC ***(refd)***
Mohindar Singh & Anor v. Rex [1950] 1 LNS 42 PC ***(refd)***
Positive Vision Labuan Ltd v. Ketua Pengarah Hasil Dalam Negeri & Other Appeals [2017] 9 CLJ 595 FC ***(refd)***
Protasco Bhd v. PT Anglo Slavic Utama & Ors [2015] 1 LNS 1052 HC ***(refd)***
Smt Geeta v. State of U.P & AMP LNIND 2010 SC 1218 ***(refd)***
SR Batliboi & Co v. Department of Income Tax (Investigation) LNIND 2009 DEL 689 ***(refd)***
Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 5 CLJ 673 FC ***(refd)***
Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd [2002] 3 CLJ 624 CA ***(refd)***
Walsh v. Alexander (1913) 16 CLR 293 ***(refd)***
Yeo Hock Cheng v. Rex [1938] 1 LNS 117 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 126, 127, 128, 129
Federal Constitution, art. 160(2)
Income Tax Act 1967, ss. 80(1), 116(a), 142(5)(a), (b)
Interpretation Acts 1948 and 1967, s. 3
Legal Profession Act 1976, s. 78
Solicitors' Account Rules 1990, r. 2

Other source(s) referred to:
NS Bindra's Interpretation of Statutes, 8th edn, p 275

For the plaintiff - Anand Raj & Foong Pui Chi; M/s Shearn Delamore & Co
For the defendant - Ahmad Ishak Mohd Hassan & Ruzaidah Yaacob; Senior Revenue Counsel; Inland Revenue Board of Malaysia

Reported by Wan Sharif Ahmad

JUDGMENT

Kamaludin Md Said J:

Introduction

[1] The plaintiff filed an originating summons ("OS") dated 7 March 2017 against the defendant seeking the following reliefs:

(i) a declaration that s. 142(5) of the Income Tax Act 1967, does not entitle or empower the defendant to disregard the privilege under Malaysian law that protects all communications, books, objects, articles, materials, documents, things, matters or information passing between an advocate and solicitor and his/her client or advice given by an advocate and solicitor to his/ her client, whether contained in any book, statement, account or other record of any description whatsoever (hereinafter collectively referred to as "client communications"), and which

privilege is referred to variously under Malaysian law as "legal privilege" (hereinafter referred to as "privilege") by requesting or demanding access to, or disclosure of, such client communications from any advocate and solicitor, unless privilege is waived by the client;

(ii) a declaration that Part V of the ITA generally, and s. 80 of the ITA in particular, do not entitle or empower the defendant to disregard the privilege that protects all client communications by requesting or demanding access to, or disclosure of, any such client communications from any advocate and solicitor, unless privilege is waived by the client;

(iii) a declaration that privilege under Malaysian law generally, and as referred to in ss. 126, 127, 128 and 129 of the Evidence Act 1950 in particular, require an advocate and solicitor to reject any request or demand of the defendant for access to, or disclosure of, any, client communications, unless privilege is waived by the client.

[2] Both parties have duly filed the following cause papers:

(i) originating summons dated 7 March 2017;

(ii) affidavit in support affirmed by Karen Cheah Yee Lyn on 7 March 2017;

(iii) affidavit in reply affirmed by Hazlina binti Hussain on 28 April 2017;

(iv) affidavit in reply affirmed by Karen Cheah Yee Lyn on 26 May 2017; and

(v) affidavit in reply affirmed by Chan Weng Keng on 29 May 2017.

[3] Both parties have filed their respective written submissions. The plaintiff's OS was heard on 16 January 2018 and the decision was adjourned to 29 March 2018 and subsequently on 2 April 2018.

Brief Facts

[4] The plaintiff had written in to the defendant on 3 November 2016 to state that:

(i) the plaintiff had received complaints from members of the Malaysian Bar that officers of the defendant have been carrying out raids on the plaintiff's members' law firms to conduct audit of their client's account and insisting to have sight of the relevant accounting books and records;

(ii) the plaintiff has taken a stance that such audit breaches the principle of solicitor-client privilege;

(iii) section 142(5) of the Income Tax Act 1967 should not and does not prevail over the solicitor-client privilege.

[5] The plaintiff has also on 29 November 2016 written in to the defendant as a follow-up reminder to his letter dated 3 November 2016.

[6] The defendant had replied to the plaintiff's letter *vide* letter dated 7 December 2016 and stated that:

(i) the defendant believes that in providing service to the public, the plaintiff has always ensured that their duty was observed in accordance with the law, but in ensuring tax compliance amongst the taxpayers, the defendant is under a duty to conduct audit to ensure that the tax assessment made is in accordance with the provision of the Income Tax Act 1967;

(ii) the defendant took the stance that sub-s. 142(5) of Income Tax Act 1967 overrides the provisions of Chapter IX of Part III, Evidence Act 1950 and the Legal Profession Act 1976. In other words, the audit conducted by the defendant did not breach the principle of solicitor-client privilege;

(iii) the defendant's stand is based on the following:

(a) Basic legal provision regarding the solicitor-client privilege had been provided under s. 126 Chapter IX Part III of the Evidence Act;

(b) However, the provision of sub-s. 142(5)(b) of the ITA in specific overrides provisions of the Evidence Act and the Legal Profession Act.

(c) In addition, it is pertinent to stress that the defendant's officers are statutorily empowered under sub-s. 80(1) to have full and free access to all lands, buildings and places and to all books, documents etc.

(d) Therefore, the failure of the lawyers or their clients in giving access to the documents to the audit officers are in breach of the ITA 1967 and can be prosecuted under sub-s. 116(a) of the ITA 1967.

The Issues

[7] The plaintiff, in this case, had relied on s. 126 of the Evidence Act 1950 ("EA 1950") which generally provides for the evidentiary provision of the legal privilege principle whilst the defendant argues that s. 142(5) of the Income Tax Act 1967 ("ITA 1967") which specifically provides for law firm's client's account was not protected by privilege by its overriding effect over s. 126 of the EA 1950. Amidst all these, the question of law for the determination of this court is whether s. 142(5) of the ITA 1967 prevails over s. 126 of the Evidence Act 1950 as there is a conflict between both provisions.

[8] If the answer is in the affirmative, then the defendant is entitled to be given access to, or disclosure to the plaintiff's members' (hereinafter referred to as the law firm) client's account for the purpose of tax audit/investigation.

[9] After hearing the oral submissions from the plaintiff's counsel and the Senior Revenue Counsel (SRC) for the defendant and also referred to their written submissions and the authorities cited therein, the answer to the above issue which is in the opinion of this court is stated in the following paragraphs of this judgment.

Whether Section 142(5) Of The Income Tax Act Overrides Section 126 Of The Evidence Act 1950

[10] I have considered the defendant's position especially the submission that sub-s. 142(5)(b) of the ITA has made it clear that its overriding effect extended to the operation of s. 126 of the EA 1950. The term "save as provided in para. (b)" in sub-s. 142(5)(a) of the ITA 1967 connotes that the operation of s. 126 of the EA 1950 which was part of Chapter IX of Part III of the EA 1950 is subjected to and has been ousted by the operation of sub-s. 142(5)(b) of the ITA 1967. When s. 142(5) of the ITA containing the said clause refers to any particular provision which it intends to override, *inter alia*, s. 126 of the EA 1950, it is permissible to hold that it excludes the whole application of s. 126 of the EA 1950.

[11] I do not agree that s. 142(5)(b) of the ITA 1967 goes beyond the provision of s. 126 of the EA 1950. The argument is misconceived.

[12] Section 126 of the Evidence Act 1950 ("EA") lies within Chapter IX Part III of the EA which provides that:

> (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
>
> Provided that nothing in this section shall protect from disclosure:
>
> (a) Any such communication made in furtherance of any illegal purpose;
>
> (b) Any fact observed by any advocate in the course of his employment as such showing that any crime of fraud has been committed since the commencement of his employment
>
> (2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

"Save As Provided" In Section 142(5)(b) Of The ITA 1967

[13] Firstly, s. 142(5)(b) of the ITA 1967 says:

> (a) **Save as provided in paragraph (b) nothing in this Act shall**:
>
> (i) affect the operation of Chapter IX of Part III of the Evidence Act 1950 (Act 56); or

(ii) be construed as requiring or permitting any person to produce or give to a court, the Special Commissioners, the Director General or any other person any document, thing or information on which by that Chapter or those provisions he would not be required or permitted to produce or give to a court.

(b) **Notwithstanding the provisions of any other written law**, where any document, thing, matter, information, communications or advice consists wholly or partly of, or relates wholly or partly to, the receipts, payments, income, expenditure, or financial transactions or dealings of any person (whether an advocate and solicitor, his client, or any other person), it shall not be privileged from disclosure to a court, the Special Commissioners, the Director General or any authorised officer if it is contained in, or comprises the whole or part of, any book, account, statement, or other record prepared or kept by any practitioner or firm of practitioners in connection with any client or clients of the practitioner of firm of practitioners or any other person.

[14] My reading of the above provision is that only para. (b) of s. 142(5) of the ITA 1967 excludes or overrides privilege conferred in other written law. The Act does not affect the operation of Chapter IX of Part III of the Evidence Act 1950 (Act 56); or be construed as requiring or permitting any person to produce or give to a court, the Special Commissioners, the Director General or any other person any document, thing or information on which by that chapter or those provisions he would not be required or permitted to produce or give to a court.

[15] Paragraph (b) of s. 142(5) which was inserted *vide* the amendment made in Income Tax (Amendment) Act 1974 commences with the words "Notwithstanding the provisions of any other written law". Therefore, my view is as far as other written law which prohibit the disclosing or producing any document, thing or information to a court, the Special Commissioners, the Director General, such protection or privilege does not apply. Paragraph (b) overrides that Chapter or those provisions in that written law. **Paragraph (b) saves Chapter IX of Part III of the Evidence Act 1950 from the operation of the ITA 1967**. In other words, s. 126 of the Evidence Act 1950 ("EA") which lies within Chapter IX Part III of the EA is saved and not caught under s. 142(5) of the ITA 1967. Section 126 of the EA shall prevail over s. 142(5) of the ITA 1967 but of course the proviso in s. 126 does not protect privilege to disclose or produce any document, thing or information to communication made in furtherance of any illegal purpose and for showing that any crime of fraud has been committed by the advocate.

[16] The wordings of s. 142(5) of the ITA 1967 are clear and unambiguous and it should not be misinterpreted or assigned with another meaning. This has been decided by Federal Court in *Positive Vision Labuan Ltd v. Ketua Pengarah Hasil Dalam Negeri & Other Appeals* [2017] 9 CLJ 595; [2017] MLJU 183;

> The wordings of section 3B of the ITA and sections 3A and 2(3) of LABATA as well as the Exemption Order are clear and unambiguous. **It is trite that when the provisions of law are clear and do not admit of any ambiguity, then the provisions must be strictly interpreted**. This court in the case of *Krishnadas Achutam Nair & Ors v. Maniyam Samykano* (1997) 1 MLJ 94 had held:
>
> > the function of a Court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. *Prima facie, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant*. It must be borne in mind that:
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> As a general rule a Court will adopt that construction of a **statute which will give some effect to all of the words which it contains**. Per Gibbs J in *Beckwith v. R* (1976) 12 ALR 333, at p. 337.
>
> (emphasis added)

[17] I am inclined to agree with the plaintiff's submission that the defendant has clearly failed to appreciate that the ancient rules of privilege were framed to protect clients' confidentiality and thus it should not be treated in such a cavalier fashion as the defendant had submitted before this court. The defendant has clearly confused themselves as they have failed to understand privilege and also failed to address it.

[18] I agree with the plaintiff that the defendant has wholly misconstrued the applicability of the *non-obstante* clause in the instant case. The correct operation of a *non-obstante* clause has been explained by the recent Federal Court in the case of *Ho Tack Sien & Ors v. Rotta Research Laboratorium S.p.A & Anor; Registrar Of Trade Marks (Intervener) & Another Appeal* [2015] 4 CLJ 20; [2015] 4 MLJ 166 where Zulkefli CJ held:

> [39] Although s 40(1) of the Act begins with the words **'notwithstanding …'. it is a general principle that a *non-obstante* clause cannot go outside the limits of the Act itself**. We are in agreement with the contention of the plaintiff that ***non-obstante* clause is subject to the limitations contained in the section and cannot be read as excluding the whole Act and standing by itself** … .
>
> (emphasis added)

[19] Further, in *Smt Geeta v. State of U.P & AMP LNIND* 2010 SC 1218, the Indian Supreme Court cited a few earlier Supreme Court cases, including *AG Varadarajulu And Another v. State Of Tamil Nadu and others* (1998) 4 SCC 231 (which has been cited with approval by *Ho Tack Sien (supra)*), to emphasise the importance of ascertaining the Legislature's intention in interpreting *non-obstante* clauses (at pp. 288 of PBA4):

38. This Court also held in the case of ICICI Bank Ltd. v. S/DCO Leathers Ltd & Ors, reported in (2006) 10 SCC 452, that the wide amplitude of a *non-obstante* clause must be kept confined to the legislative policy and it can be given effect to, to the extent the Parliament intended and not beyond the same and that in construing the provisions of a *non-obstante* clause, it was necessary to determine the purpose and object for which it was enacted (See page 465- 6).

39. In *Central Bank of India v. State of Kerala & Ors*, reported in (2009) 4 SCC 94, this Court reiterated that while interpreting a *non-obstante* clause the court is required to find out the extent to which the legislature intended to give it an overriding effect.

(emphasis added)

[20] Accordingly, care has to be exercised in construing the *non-obstante* nature of s. 142(5) of the ITA so as to give effect to the intention of the Parliament and not to go beyond the purpose and object for which s. 142(5) of the ITA is enacted.

[21] Whilst s. 142(5)(b) of the ITA was enacted by the Parliament to "enable disclosure of information contained in records to be required and to be made and prevents privilege from being claimed in respect of such information, notwithstanding any other written law to the contrary" according to the Explanatory Statement, my view is that s. 142(5)(b) of the ITA, at most, only has the effect of removing privilege in respect of any book, account, statement or other record prepared or kept by "practitioners" such as tax accountants and tax agents with a view to taxing their clients and it does not extend to "advocates and solicitors". I agree with the plaintiff that this is because it is clear from s. 142(5)(b) of the ITA itself that Parliament had used two different terms, namely "practitioner" and "advocate and solicitor".

[22] It is axiomatic that when different words are used in a statute, they refer to different things and this is particularly so where the different words are, as here used repeatedly. This leads to the view that in the ordinance there is a distinction between the jurisdiction of a court and its powers (see the judgment of Thomson CJ in *Lee Lee Cheng v. Seow Peng Kwang* [1960] MLJ 1). It is a principle of statutory interpretation that when the Legislature uses different language in the same connection in different parts of the statute, it is presumed that a different meaning and effect is intended, and if different language is used in contiguous provisions, it must be presumed to have done so designedly (see *NS Bindra's Interpretation of Statutes* (8th edn) at p. 275) (See His Lordship Arifin Zakaria FCJ in the recent Federal Court case of *Manokaram Subramaniam v. Ranjid Kaur Nata Singh* [2008] 6 CLJ 209; [2009] 1 MLJ 21).

[23] Accordingly, in s. 142(5)(b) of the ITA, Parliament had clearly used different words as it recognised that "practitioner" and "advocate and solicitor" are different persons and it is trite that Parliament does not act in

vain and significance must be given to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded - *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511; [1985] CLJ (Rep) 122; [1985] 2 MLJ 35.

[24] I further agree with the plaintiff that the terms "practitioner" and "advocate and solicitor" in s. 142(5)(b) of the ITA are meant to refer to different persons, especially in light of the numerous times the term "advocate" has been used throughout the statute. The meaning of "practitioner" and "advocate and solicitor" must be consistent throughout the ITA as a statute must be read as a whole - *Kesultanan Pahang v. Sathask Realty Sdn Bhd* [1998] 2 CLJ 559; [1998] 2 MLJ 513.

[25] The intention of the Parliament and the object and purpose of s. 142(5)(b) of the ITA has been thoroughly explained in the plaintiff's written submission as follows:

(i) the deliberate and conspicuous dropping of the word "legal" preceding "practitioner";

(ii) in reading the ITA as a whole, the word "practitioner" only appears in s. 142(5)(b) of the ITA whereas the word "advocate" appears six times and is clearly intended to refer to an advocate and solicitor - s. 3 of the Interpretation Acts 1948 and 1967;

(iii) the Legal Profession Act 1976 uses "legal practitioner" throughout the Act;

(iv) Section 142(5)(b) of the ITA contains a reference to "advocate and solicitor" and a reference to "practitioner". As Parliament does nothing in vain, two different phrases must convey two different meanings - *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511; [1985] CLJ (Rep) 122; [1985] 2 MLJ 35, *Funk David Paul v. Asia General Asset Bhd* [2013] 1 LNS 1327; [2014] 1 MLJ 681, *Gurbachan Singh v. PP* [1967] 1 LNS 50; [1967] 2 MLJ 220, *Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2007] 5 CLJ 673; [2007] 6 MLJ 581;

(v) "advocate and solicitor" is a technical phrase and it is not to be supposed that Parliament uses the phrase in any other sense - *Mohindar Singh & Anor v. Rex* [1950] 1 LNS 42; [1950] MLJ 97, *DP Vijandran v. Majlis Peguam* [1996] 1 CLJ 23; [1995] 3 MLJ 576, *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195; [2006] 5 AMR 585, *Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd* [2002] 3 CLJ 624; [2002] 2 MLJ 707;

(vi) the terms "contained in records" of the Explanatory Statement demonstrate that s. 142(5) of the ITA does not enable the disclosure of privileged communications *per se*, ie, any documents pertaining to client communications found in the possession of solicitors to the defendant; and

(vii) the phrase "notwithstanding the provisions of any other written law" in s. 142(5)(b) of the ITA does not eliminate the operation of common law.

[26] Therefore, s. 142(5)(b) of the ITA cannot be used by the defendant as an excuse to be given access to the clients' account with a view to taxing the advocates and solicitors.

The Common Law On Privilege

[27] I am also of the view that the words "**notwithstanding the provisions of any other written law**" in s. 142(5)(b) of the ITA do not exclude the operation of common law.

[28] In *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 1 CLJ 701; [2004] 2 MLJ 257, the Federal Court discussed art. 160(2) of the Federal Constitution which recognises that common law is different from that of written law (at pp. 307 of PBA4):

> The Court of Appeal correctly referred to the definition of 'law' in art. 160(2). It reads as follows:
>
> > **Law includes written law and the common law** in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.
>
> (emphasis added)

[29] It is trite that in enacting a statute, the Parliament may elect to exclude common law. The High Court of Australia held in the case of *Blunden v. Commonwealth of Australia* [2003] HCA 73 that:

> For the purposes of s 80 of the Judiciary Act the words 'laws of the Commonwealth' related only to statute law and **did not include common law**.
>
> (emphasis added)

[30] Section 142(5) of the ITA makes no reference to common law and therefore, such an exception should not be read into the statute. This has been confirmed in *Yeo Hock Cheng v. Rex* [1938] 1 LNS 117; [1938] 1 MLJ 104 where the court confirmed the pronouncement in the case of *Arthur v. Bokesham* 11 Mod 150 that:

> The general rule in exposition of all Acts of Parliament is this, that in all doubtful matters, and where the expression is in general terms, they are to receive *such a construction as may be agreeable to the rules of common law in cases of that nature: for statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare*.
>
> (emphasis added)

[31] The Supreme Court in *Manilal & Sons (M) Sdn Bhd v. M Majumder* [1988] 1 LNS 16; [1988] 2 MLJ 305 cited *Walsh v. Alexander* (1913) 16 CLR 293 with approval:

> ... that where rights and liabilities are not created by a statute, but arise by common law, then, even though they are affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed by common law, yet, **unless the statute expressly or by necessary implication excludes the common law remedy, the latter still remains**.
>
> (emphasis added)

[32] This is fortified by the judgment of New Zealand Court of Appeal in *Commissioner of Inland Revenue v. West-Walker* [1954] NZLR 191:

> And where an affirmative statute is open to two constructions, that construction ought to be preferred which is consonant with the common law.

[33] Applying the above authorities, I agree with the plaintiff that Parliament does not intend to apply s. 142(5)(b) of the ITA to the exclusion of the common law on privilege and that s. 142(5)(b) of the ITA cannot be given effect to the extent beyond Parliament's intention. At most, s. 142(5)(b) of the ITA may only apply to possible secondary cases.

Section 126 Of The EA Is The Specific Provision

[34] I also agree with the plaintiff that the defendant has also misunderstood and misapplied the Latin maxim of *generalia specialibus non derogant* in this case. Based on the clear and express language in s. 126 of the EA, it cannot be disputed that the EA is the specific statute which governs matters pertaining to privilege. Although s. 126 of the EA was enacted before s. 142(5) of the ITA, it is a specific provision on privilege, and as such excludes the operation of the general provision of s. 142(5) of the ITA to the extent of any inconsistency (See *Director of Customs, Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation)* [1995] 3 CLJ 316; [1995] 2 MLJ 600 and *Bennion on Statutory Interpretation*, 6th edn).

[35] The plaintiff has submitted numerous authorities on the subject matter of privilege. The defendant cannot ignore the superior and apex courts' judgments that privilege is absolute and it remains so until waived by the privilege holder.

[36] In the very recent case of *Gideon Tan v. Tey Por Yee & Another Appeal* [2017] 1 CLJ 543; [2017] 1 MLJ 352 decided by the Court of Appeal and Federal Court, a lawyer sought to rely on privileged information to defend himself in a committal proceeding. In rejecting the same, the Court of Appeal and Federal Court once again **affirmed that privilege affords protection to clients only and not to lawyers**.

[37] Further, the Federal Court in *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] 3 CLJ 405; [2009] 3 MLJ 14 held that ss. 126 to 129 of the EA embody the common law position and expressly held that "legal professional privilege under s. 126 of the Act is absolute and it remains so until waived by the privilege holder ie, the client.". This goes to show that **Privilege is grounded and inherent in common law** and s. 142 of the ITA simply cannot take away such fundamental principles.

[38] In *Malaysian Newsprint Industries Sdn Bhd v. Bechtel International Inc & Anor* [2014] 3 CLJ 367 the court has held that that:

> The solicitor-client **privilege is absolute and permits of only one exception which is waiver**: (a) upon the express consent of the client given and directed to the advocate; and (b) such consent must be intentional and deliberate.
>
> ...
>
> *The law is very clear that this privilege is absolute and permits of only one exception which is upon the express consent of the client given and directed to the advocate and which consent must be intentional and deliberate. The common law maxim "once privileged, always privileged" as embodied in ss. 126 to 129 of the Evidence Act 1950 must be recognised.*
>
> (emphasis added)

(See also *Protasco Bhd v. PT Anglo Slavic Utama & Ors* [2015] 1 LNS 1052; [2016] 7 MLJ 523)

[39] As submitted by the plaintiff, s. 126 of the EA embodies every privileged communication, including the client communications. The terminology of "in the course and for the purpose of (an advocate's) employment" is repeated numerous times throughout s. 126 of the EA. However, s. 142(5)(b) of the ITA merely makes reference to the term "in connection with any client". The terminology of "in connection with" is far from specific and is extremely general as to its meaning as well as its applicability.

[40] As such, the EA is undeniably more precise, unambiguous and specific. With those circumstances in mind, it is my considered opinion that s. 126 of the EA must take precedence over s. 142(5)(b) of the ITA to the extent of any inconsistency in respect of matters relating to privilege.

[41] It is to be noted that the defendant, in fact, has admitted that the ITA is a general legislation by citing the following passage from the case of *Ketua Pengarah Hasil Dalam Negeri v. Malaysian Bar* [2006] 5 CLJ 217:

> [3] Section 80(13) of the LPA stipulates that the Malaysian Bar be exempted from tax on the compensation fund. The said provision is constituted under art. 96 of the Federal Constitution which provides "No

tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law." **The LPA is a specific legislation whilst the ITA is a general legislation**. Where there is a conflict between the LPA and ITA provisions, the LPA prevails. ...

(emphasis added)

[42] I would agree with the plaintiff that the fact that the Parliament would have had in mind the earlier (although not general) Act (the EA) when it enacted the later Act (the ITA) and intentionally chose a different terminology, ie, "practitioner" as opposed to "advocate", is evident of Parliament's intention that s. 142(5)(b) of the ITA is not to be applied to advocates and solicitors. Otherwise, the Parliament would have used the same terminology in the ITA having in mind the EA.

Basis For Looking Into The Client's Accounts

[43] The defendant has stressed that the defendant is clear with its objective in requesting for a view to the law firm's client's account which is to ensure that the law firm itself does not understate its income and therefore, an audit on the full documents held by the applicant is necessary which also includes the "client's account". The plaintiff has a duty to regulate the LPA which includes providing for the keeping by advocates and solicitors at banks for client's money **pursuant to s. 78 of the LPA**. In furtherance to that, **r. 2 of the Solicitors' Account Rules 1990 ("SAR")** provides that a "client account" means "a current or deposit account at a bank **in the name of the solicitor** in the title of which the word "client" appears".

[44] Based on the same provision it can be concluded and it is also never disputed that the plaintiff's members (law firms) had full access to maintain the client's account. Therefore, the client's account is never fully protected from misuse by the law firms and this is supported by myriads of cases where law firms had misused the client's account which also includes circumstances whereby the client's account was used to hold transfers which were done fraudulently by law firms.

[45] Defendant submitted that this illegal conduct is not foreign in other developing countries. In fact, few attempts had been done by local authorities in other developing country to curb the matter. Relying on the same basis, the defendant finds it important to ensure that the plaintiff did not use the client's account as a means to park the law firm's own incomes which will then result in an understatement of income by the respective law firm. The decision to look into the respective law firm's client's account was not done arbitrarily but in fact in accordance with the law. Had the law not provided for the same, the defendant would not have decided to look into the plaintiff's members' client's accounts.

[46] In essence, what the defendant is trying to say is that although as contended by the plaintiff, "client's account" does not hold monies of lawyers but it is rather a subjective matter open to challenge. This is because, few cases cited had proven that "client's account" had been misused by law firms as the account was actually made in the name of the solicitor itself. This shows multiple possibilities of misuse of "client's account" for law firm's income.

[47] The plaintiff in reply submitted that the equitable doctrine that an Act of Parliament (in this case, the ITA) shall not be used as an instrument of fraud has long been recognised and applied in numerous English and Malaysian cases (see *British Railways Board v. Pickin* [1974] AC 765, House of Lords and *Koh Siew Keng & Anor v. Koh Heng Jin* [2008] 3 CLJ 450; [2008] 3 MLJ 822, CA). In the instant case, it was the plaintiff's contention that the defendant has sought to use the ITA as an instrument of fraud purportedly to fish for information on the clients of the law firms.

[48] Further, the audits carried out by the defendant on the law firms and the documents related to client communications are in the guise of a fishing expedition to unlawfully fish for information on the clients of the law firms. Such unmeritorious conduct of the defendant in seeking to use s. 142(5) of the ITA as an engine of fraud is abusive, unlawful and illegal.

[49] In the case of *SR Batliboi & Co v. Department of Income Tax (Investigation)* LNIND 2009 DEL 689, the High Court of India held:

> It appears plain to us, therefore, that for a search or seizure to be legal it should not be firstly ordered for *mala fide*, extraneous or for oblique reasons. Secondly, it must be predicated on information received by the Authority who would have reason to believe that it is necessary to conduct such an operation. **Thirdly, it should not be in the nature of a roving or fishing exercise**. These three factors must be observed rigorously and even punctiliously since the exercise of such powers invariably result in a serious invasion of the privacy and freedom of the citizen ...
>
> **It is also our view that the Income Tax Department cannot make fishing or roving inquiry to initiate proceedings against all these companies which are the clients of the Petitioner**.
>
> (emphasis added)

[50] The plaintiff contended that the defendant failed to comprehend that, by looking into the clients' accounts of the law firms in the process of auditing the law firms, the defendant could never be able to ascertain the income of the law firms, as the clients' accounts do not in any way constitute part of the income of the law firms - *Choong Yik Son v. Majlis Peguam Malaysia* [2008] 10 CLJ 101; [2008] 7 MLJ 215. It is also held that any advocate and solicitor caught meddling with the client's account must face the wrath of the law.

[51] Applying the above authorities, the plaintiff submitted that the contention by the defendant is merely an excuse for the defendant to unlawfully fish for information from the clients of the law firms. The defendant's contention which is based on presumption does not hold water and is bound to fail.

[52] My observation is that while the defendant may have its own purpose and objective, however, any action done must be in accordance with the law. It is understood that the defendant relied on s. 142(5) of the ITA to view the "client's account". But while I agree that para. (b) of s. 142(5) does not protect privileged communication or documents in other written law, the fact remains that solicitor-client privilege under s. 126 of the Evidence Act 1950 ("EA") which lies within Chapter IX Part III of the EA is not affected by the operation of the ITA 1967.

[53] Be that as it may, s. 126 of the EA does not protect the privilege in the following circumstances:

(i) Any such communication made in furtherance of any illegal purpose;

(ii) Any fact observed by any advocate in the course of his employment as such showing that any crime of fraud has been committed since the commencement of his employment.

[54] It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

[55] In my considered opinion, before the defendant is required to view the "client's account" there must be some information of an illegal act/purpose and/or any crime of fraud or reasonable belief that the plaintiff has used the client's account as a means to park the law firm's own incomes which resulted to an understatement of income by the respective law firm which warrants an investigation.

Conclusion

[56] In conclusion, the summary of my decision are as follows:

(a) privilege is absolute unless it is waived by the privilege holder or falls within the proviso to s. 126 of the EA and it therefore affords protection to clients and not to lawyers;

(b) it is not open for the defendant to have any access to the client's account with a view to checking whether the law firms have understated their income without having any reasonable suspicion of any misconduct or criminal conduct on the part of the law firms;

(c) the defendant cannot be allowed to use the ITA as an instrument of fraud purportedly to fish for information on the clients of the law firms;

(d) the *non-obstante* nature of s. 142(5)(b) of the ITA ought to be read in accordance with the actual words of Parliament;

(e) section 142(5)(b) of the ITA, at most, only has the effect of removing privilege in respect of any book, account, statement or other record prepared or kept by "practitioners" such as tax accountants and tax agents with a view to taxing their clients and it does not extend to "advocates and solicitors";

(f) in s. 142(5)(b) of the ITA, Parliament had clearly used different words as it recognised that "practitioner" and "advocate and solicitor" are different persons;

(g) section 142(5)(b) of the ITA does not oust the common law on privilege; and

(h) based on the clear and express language in s. 126 of the EA, it cannot be disputed that s. 126 of the EA is the specific provision which governs matters pertaining to privilege. The defendant has misunderstood and misapplied the Latin maxim of *generalia specialibus non derogant*.

[57] In the result, the answer to the issue is in the negative. I allowed the plaintiff's application in the originating summons with cost of RM5,000.